United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1011

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1011

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK LUCAS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT, FRANK LUCAS

JEFFREY C. HOFFMAN,
Attorney for Appellant, Frank Lucas,
477 Madison Avenue,
New York, N. Y. 10022
(212) 688-7788

STEVEN DUKE,
JOHN L. POLLOK,
Of Counsel.

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BRIEF FOR THE APPELLANT, FRANK LUCAS

Statement of the Issues Presented for Review

1. Did the court below err in allowing the prosecution over objection to introduce evidence of prior crimes purportedly committed by a number of the defendants, which acts predated the conspiracy alleged in the indictment by as much as 25 years?

2. Did the court below err in admitting in evidence $585,000 in cash seized from the home of the defendant Lucas almost one year after the conclusion of the conspiracy?

3. Was the error of prejudicial variance committed when the evidence indicated at least three separate and distinct conspiracies and the indictment charged a single massive conspiracy to violate the narcotics laws?

4. Were the court's instructions to the jury, taken as a whole, prolix, confusing, contradictory and full of error?

5. Was the court's charge to the jury on conspiracy erroneous, contradictory and hopelessly confusing on the definition of conspiracy?

6. Was the court's charge on evidence of a defendant's membership in a conspiracy erroneous?

7. Was the court's charge on the responsibility for acts and statements of co-conspirators erroneous?

8. Did the court erroneously and improperly lecture the jury on the dangers of conspiracy?

9. Did the court err in instructing the jury pursuant to *Pinkerton* v. *United States*, 328 U.S. 640 (1946)?

10. Was the court's charge on accomplices' testimony inadequate and erroneous, particularly when considered together with the improper remarks made by the Judge during the cross-examination of the witness Perna?

11. Was the court's charge on reasonable doubt erroneous and confusing?

12. Did the District Court err in denying the defendant's motion for a new trial without an Evidentiary hearing?

13. Did the court deny the defendant the right to be represented at all stages of the proceedings?

14. Should the written Judgment and Commitment be modified to conform to the sentence orally imposed?

Statement of the Case

Defendant-appellant Frank Lucas and six other defendants were convicted in the Southern District of New York for violations of the federal narcotics laws. Trial was by jury before the Honorable Irving Ben Cooper. Defendant was convicted of conspiring to distribute narcotics (Count 1) and three substantive offenses (Counts 5, 6 and 7) in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), 846. On January 27, 1976, Judge Cooper sentenced defendant to serve twenty years in prison on Counts 1 and 5, concurrent but consecutive to additional concurrent terms of twenty years on Counts 6 and 7, together with a committed fine of $50,000 on each count. The total sentence was thus forty years in prison and a $200,000 fine.

Defendant, who is currently incarcerated on an unrelated sentence in Trenton State Prison, was also given six years special parole by Judge Cooper.

Finally, Judge Cooper provided in the written commitment that it was to be served "in addition to, and exclusive of, any sentence of any kind being served *or to be imposed in the future*" (emph. supp.) (A.637).[1]

This appeal is from the judgment of conviction, the sentence, and the denial of a motion for new trial.

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[1] The reproduced appendix of the appellant is cited *infra* using the prefix "A". References to the trial transcript, a copy of which is on file with this court, bear the prefix "R". Government exhibits are referred to as "GX."

Statement of Facts

The indictment charged defendant Lucas in Count 1 with conspiring from January 1, 1973, with 19 other defendants and numerous unindicted co-conspirators, to violate the narcotics laws of the United States. Lucas was also charged with possessing heroin with intent to distribute in March, October and December, 1973 (Counts 5, 6 and 7). Other defendants were accused in thirteen other substantive counts [2] (A. 18-27).

1. The Prosecution's Case

The Government's case consisted primarily of the testimony of two co-conspirators, Mario Perna and Anthony Verzino, both of whom had been arrested in February, 1974 and who became Government informers soon thereafter (R. 919-30, 2103). From these witnesses, the following story emerged:

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[2] Joseph Magnano, also known as "Joe the Grind", hereinafter referred to as "Magnano", received a sentence of 30 years. Frank Pallatta, hereinafter "Pallatta" but also identified during the trial as "Frankie Bolot", was sentenced to a prison term of 30 years. Anthony DeLutro, also known as Tony West and hereinafter referred to as "DeLutro", was sentenced to 25 years in jail. Anthony Soldano received a prison term of 15 years, Richard Bolella was sentenced to serve 20 years and John Gwynn was sentenced to serve a term of 8 years. The jury could not agree on a verdict as to the defendant Chapman. The defendants Louis Macchiarola, a/k/a "Red Hot", Michael Carbone, Dominick Tufaro a/k/a "Donnie Boy", Frank Ferraro a/k/a "Scooch", Joseph Malizia a/k/a "Patsy Pontiac", Ernest Malizia, and St. Julian Harrison were fugitives at the time of trial. Gerard Cachoian and Roberto Rivera pleaded guilty prior to trial. Frank Caravella was severed prior to trial (A. 1-8).

(a) The formation of the Perna-Malizia partnership

In Febr... y, 1973, following his release from the federal penitentiary in Atlanta, after serving a narcotics sentence, Perna met Ernest Malizia, a federal fugitive (R. 452-3).[3] The two men formed a partnership for the distribution of narcotics and began searching for a source of supply (R. 454-5). "Sally Moon," a used car salesman in Mt. Vernon, put them in touch with the defendant Pallatta, whom they met at a dice game in the Bronx (R. 458-64). Perna, Malizia and Pallatta discussed buying "goods" from the latter, who indicated he would have to consult his partners. The three agreed to meet in Yonkers the following Sunday (R. 464-5). On that date, Pallatta agreed to sell and Perna and Malizia to buy, diluted heroin at $25,000 per kilo (R. 467-70). Pallatta identified his partners as "Donnie Boy" (Dominick Tufaro), "Red Hot" (Louis Macchiarola); "Mikie" (Michael Carbone), and "Joe the Grind" (Joseph Magnano) (R. 469, 479).

Perna and Malizia acquired a "stash," and received the first delivery, on consignment, at the Alterton Theatre in the Bronx. Delivery was made by defendant Ferraro, a.k.a. "Skooch" (R. 478-79). The pair then took the heroin to the stash and further diluted it (R. 480). Later, they tested it on an addict named Flaco, who said it was good (R. 482-5). The two then spent several

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[3] Perna's qualifications as a witness included among other things conspiracy to commit murder (R. 952, 965-968); conspiracy to import drugs between 1970 and 1972 (R. 954); conspiracy to traffic in cocaine in the Southern District of Florida in 1972 and 1973 (R. 955); possession and sale of narcotics in 1958 (R. 970); lying to a Catholic priest in an attempt to escape from prison (R. 1019); bribing a corrections officer (R. 1020); desertion in time of war (R. 1030); armed robbery (R. 1031); and perjury (R. 1050-1052).

days finding customers for resale of the two kilos they had obtained from Pallatta (R. 488-9). Flaco bought 1/8 kilo for $4,000; 1/4 was sold to a man named Joe for $8,000; 1/8 to an unnamed person, and 1/4 of a kilo to defendant Rodriguez, whom Perna knew as Casanova (R. 495-501). They also sold half a kilo to defendant Gwynn, for $15,000 (R. 502-07).[4] Later, they agreed to furnish drugs, dilutants and know-how to Joseph Condella, in Hoboken (R. 509).

Perna and Malizia spent much of the week making collections on the consigned goods and getting further orders (R. 510-512). However, they could give Pallatta only seven or eight thousand dollars when the three met the following Sunday (R. 513-514). Pallatta insisted that he be paid by the following Wednesday (R. 515-516). Perna and Malizia spent the next several days collecting, taking re-orders and making deliveries on the new orders (R. 539). When they met with Pallatta on Wednesday, however, they were able to pay only $20,000 in cash. Another appointment was made for a few days hence for the additional payments (R. 540-543).

Several days later, Perna met St. Julian Harrison who agreed to purchase three kilos at $28,000 per kilo. Since Perna and Malizia only had one-half kilo left, they met Pallatta in Yonkers, paid him another $20,000 and ordered four kilos more. Pallatta agreed and delivery occurred the following day (R. 547).

The heroin was diluted, then delivered to Harrison who agreed to pay within three days (R. 550-552). On the latter date, Perna and Malizia met with Harrison again. He told them that his partner, defendant Frank

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[4] Some 250 pages of the record are concerned with the transaction between Gwynn and his underlings (see pp. R. 1632 et seq.). Those transactions, however, are not discussed herein. In fact, they constitute a separate and distinct conspiracy.

Lucas was assuming all of Harrison's liabilities, including the payment for the narcotics already delivered. The next day, Perna and Malizia met Harrison and Lucas. During the course of their meeting, Lucas assumed responsibility for the Harrison purchase and agreed to "take all their goods" but that $28,000 was too high a price (R. 555-559). A few days later, Lucas paid Perna $56,000. Perna agreed to supply better heroin at a lower price. Lucas agreed to buy five kilos at $25,000 per kilo (R. 572-574). Perna then met with the Pallatta group, delivered $30,000 or $40,000 and received six kilos of heroin (R. 575).[5]

During the succeeding six months, Perna and Malizia met with Lucas fifteen or sixteen times, delivering an average of five kilos of heroin each time, and receiving from him a total of $800,000 to $900,000 (R. 581-589).[6] All this heroin was purchased by them from Pallatta (R. 632).

In August of 1973, Lucas sought Perna's assistance in recovering $60,000 which had been "ripped off" by a man named Rossi in a phony cocaine transaction. Perna, however, refused (R. 589; 1881-1882).[7]

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[5] At or about the same time, Perna and Malizia were negotiating with Pallatta, Magnano, Tufaro, and Ferraro for the purchase of additional narcotics, but at a lower price (R. 561-567). The price was in fact lowered in early April 1973 after Perna and Malizia delivered $56,000 to Pallatta in Yonkers (R. 570-571).

[6] On one of these occasions five kilograms of mannite were delivered (R. 586-587).

[7] This conversation, which had no relevance to the acts charged, was admitted by the court over strenuous objection as a prior similar act (R. 590). (See *United States* v. *Bertolotti*, — F.2d — (C.A. 2, 1975)). This episode, as well as numerous other instances where the court permitted testimony of prior bad acts as early as the late 1940's, will be discussed *infra* at Point I.

(b) Verzino joins the Perna-Malizia partnership

Over the protests of Pallatta and Magnano, who didn't trust Verzino, Anthony Verzino, who had just been released from Atlanta federal prison, was admitted into the Perna-Malizia partnership (R. 633, 1846). Perna and Malizia agreed to give Verzino one-third of all future profits (R. 646; 1873-1874).

Verzino, who knew Pallatta, began negotiating with him for a lower price and finding new customers (R. 1850). Among those Verzino found was Jimmy Cullane, later disclosed to be a government informant.

(c) A venture into cocaine

In October, 1973, Perna met Gerard Cacchoian, who offered to sell some pure cocaine. Perna and his partner then contacted defendant Lucas, who agreed to buy two kilos (R. 663-665). Lucas, at the same time, bought five kilos of heroin (R. 665). The trio bought the cocaine from "Coco," diluted it, and sold it to Lucas.

According to Perna, during the fall of 1973, defendant Lucas was the trio's best customer. But he was slow in paying (R. 793). In November, 1973, Lucas met with Perna, Malizia and Verzino in the Bronx. Lucas claimed he couldn't pay because his competitors were offering better quality goods (R. 779-783, 1892). Lucas bought another two kilos of heroin at $24,000 per kilo, and promised to pay $200,000 of the money he owed (R. 784-785).

Soon thereafter, Perna and Malizia left for Florida (R. 797). On his return in December 1973, Perna called Lucas several times from his home in unsuccessful effort to collect the money Lucas owed.[8]

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[8] Despite Perna's testimony, GX 3 (Perna's telephone toll slips) show no calls between he and Lucas from December, 1973, to February 1974 (R. 1246-1249).

(d) The DeLutro transactions

In January, 1974, the Pallatta source dried up because of difficulties with the trio in paying bills (R. 2009). However, in November, 1973, Verzino had told Perna and Malizia that he had a source of pure heroin (R. 674-676). He told them that he had renewed a relationship with Anthony DeLutro (Tony West), with whom he had done business in the past (R. 1932).[9] They collected money and then delivered $200,000 to DeLutro in return for five kilos of pure heroin (R. 675-676). They took it to the "stash" where it was tested and weighed and found to be 10 ounces short (R. 676, 679). Verzino complained to DeLutro, who promised that the short weight would be made up (R. 1960).

(e) Malizia's arrest and Perna's plot to kill Verzino

On December 18, 1973 Malizia was arrested on a fugitive warrant (R. 795; 1425-1427). This and other problems caused Verzino to begin drinking too much, antagonizing customers and "talking in bars" (R. 799-801). Perna began to lose confidence in Verzino, and decided to have Verzino killed. In early January, 1974, Perna went to New Jersey to ask his customer Joseph Condella and his partner "Jimmy" to carry out the hit (R. 805). Condella agreed to kill Verzino and Perna gave him a shotgun and pistol for the purpose.[10]

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[9] Over strenuous objection, Verzino was permitted to describe a number of transactions with DeLutro antedating the charges by as much as twelve years (see e.g. A. 108-132). This is but one of a series of prior bad acts dating back to the late 1940's which the Court admitted over objection. See Point I, *infra*, where these prior activities and their grave implications are discussed in detail.

[10] Condella was cooperating with the government and wearing a body tape recorder. "Jimmy" was Special Agent James Bradley of the Drug Enforcement Administration (R. 804, 1445). The hit was not carried out.

(f) The Soldano transactions

In January, 1974, Verzino told Perna that he had a new source of pure heroin at a cost of $50,000 per kilo (R. 825). The source, referred to only as "Tony," would, however, deal only with Verzino.[11] The next morning Perna met Frank Caravella and Verzino in lower Manhattan at Ray Robbins' office. Verzino told Perna that Robbins had given him money for the impending purchase and the three left in separate cars for Long Island (R. 830). En route, they stopped at a motel, counted their cash, and then went to a bar in Port Washington (R. 2025-2029), where they met "Patsy" Malizia and "Tony" (R. 2030). Tony was upset that only $75,000 was on hand, but he accepted it and left in Verzino's car (R. 2031-2033). The trio then returned to New York. That evening, "Tony" (Soldano) delivered the narcotics to Verzino in Queens (R. 832, 833, 2035-2040).

(g) Perna's arrest

On February 1, 1974, Perna went to New Jersey to sell Condella and "Jimmy" some heroin (R. 837). He was arrested (R. 1430), and the authorities seized eight kilos of heroin, various "customer lists," notations of accounts receivable and payable, and other papers containing telephone numbers (R. 839-861; 1430; GX 1, 1A, 42, 15, 16).[12]

Perna and Malizia (who was housed at the same detention facility) subsequent to Perna's arrest, at-

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[11] The new source was apparently developed by Verzino acting in concert with Patsy Malizia (Patsy Pontiac), Ernest's brother and Frank Caravella, who acted as a middleman for Patsy, who was then, and is still a fugitive (R. 2010-2023).

[12] GX 1 bears the notation "Frank 310" which Perna maintained meant that the defendant Lucas owed his group $310,000 (R. 851). The same exhibit also purports to show that the Perna-Verzino-Malizia group owed Pallatta $333,000 (R. 855).

tempted to collect, through an attorney, the amount they claimed Lucas owed them (R. 881-887; 910-915).

On September 22, 1974, Perna, Malizia and five others escaped from the West Street detention center. Perna was soon recaptured and began cooperating with the Government.[13]

After Perna's first arrest, Verzino offered his customer Frank Caravella a partnership interest in Verzino's narcotics business. Caravella agreed and began making payments of outstanding debts to "Tony" Soldano (R. 2043-2044).

(h) Verzino is arrested and the conspiracy terminates

On February 25, 1974, Verzino and his new partner Caravella were arrested in front of their "stash" in the Bronx (R. 2656). Federal and state agents seized from them 26 pounds of heroin, diluting paraphernalia, guns, customer lists, phone numbers and address books (R. 2051-2102; 2657, 2660, 2664; GX 36, 36A, 37, 32, 35, 35A, 46).[14]

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[13] In return for his cooperation, the government promised Perna that his wife, although concededly involved in his illicit business, would not be prosecuted. Moreover, Perna testified that he would have no hesitancy in lying in order to help himself (R. 1122).

[14] Exhibit 36, which Verzino claimed was his customer list bore the notation "Moose 310". This, according to Verzino, meant that Lucas owed $310,000. It should be noted, however, that this is the only occasion in which the defendant Lucas is tagged with an alias. It was the government's position throughout that the defendant Lucas was known only by his true name. Moreover, the agents who arrested Verzino maintained that he was under their surveillance from November 1973 until his arrest. Nevertheless, they never observed him with Lucas (R. 2715-2716).

In August, 1974, Verzino began to cooperate with state law enforcement officials (R. 2103).[15]

(i) Money and paraphernalia seized from Lucas

On January 28, 1975, almost a year after Perna and Verzino's arrest, the Government seized $585,000 in cash, plastic bags and a heat sealer at the home of the defendant Lucas in Teaneck, New Jersey (R. 2870-2879; 2963-2973).

2. The Lucas Defense

Two attorneys testified that Lucas was frequently in possession of large amounts of cash; that he was a gambler and received a substantial cash income from tobacco farming. Defendant was often seen to convert his earnings and farm receivables to cash.

Defendant Lucas did not testify.

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[15] Despite his resolve to "do good", Verzino concededly lied to the state agents (R. 2105) and later lied to the Federal agents. Verzino's record includes assault with a weapon; illegal entry, and two convictions for narcotics offenses (R. 2143-2176). His other extra-curricular activities included robbery, loansharking and bookmaking.

POINT I

The court below erred in allowing the prosecution, over objection, to introduce evidence of prior crimes purportedly committed by a number of the defendants, which acts pre-dated the conspiracy alleged in the indictment by as much as 25 years.

(a) The Prior Crimes.

Verzino testified that in the late 1940's he was introduced to the use and sale of heroin by the defendant Magnano (A. 134). Similarly, Verzino was permitted to relate that he, with many of the defendants on trial had been selling narcotics in large amounts since 1959 (A. 93-105). Verzino thus testified that in 1959 and 1960 (some 13 years prior to the commencement of the instant conspiracy) he purchased high quality heroin in multi-kilo quantities from the defendants Pallatta and Magnano (A. 99-100). In 1962, according to Verzino, he introduced Pallatta, Magnano and Bollella to a man named Joe Ragone who was a source of pure narcotics. Later in the same year, Bollella purportedly thanked Verzino for the source and indicated he had made many purchases from Ragone (R. 102-103). Continuing with his twelve year old tale, Verzino related that in 1960 and 1961 he and Magnano obtained their narcotics from Pallatta and sold principally to a man identified only as "Frank Ross" (A. 103-104). Verzino was also permitted to detail a number of narcotics transactions between 1961 and 1966 with Anthony DeLutro (A. 109-112). More specifically, Verzino indicated that he had narcotics transactions with DeLutro in 1961, 1962, 1964 and 1965, wherein DeLutro sold Verzino from two to five kilograms of heroin (A. 131-132).[16] On other occasions, DeLutro

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[16] The inevitable spillover against all of the defendants must have been devastating. See *United States* v. *Miley*, 513 F.2d 1191 (2d Cir., 1975).

introduced Verzino to unnamed others who sold him narcotics (A. 132).[17]

Other examples of this kind of pernicious direct testimony abound throughout the record. For example, there is innuendo of a conspiracy between Verzino, Bollella and a fugitive named Vincent Soverio (A. 107); testimony with respect to a conspiracy betwen Bollella, Verzino and a man named Stassi to important narcotics between 1966 and 1970 when the latter two individuals were inmates in Atlanta Penitentiary (R. 872-1873, 1918-1921); and testimony by Perna relating to a conspiracy between the defendant Lucas and a man named Rossi.[18] According to Perna, sometime between April and August 1973, he and Malizia had a conversation with the defendant Lucas in which the latter sought their help in recovering $60,000 stolen from him in an alleged cocaine sale by Rossi (A. 28-40).

(b) The Applicable Law.

It is inconsistent with the fundamental principles of due process to permit the introduction of any evidence of prior crimes which might induce a jury to convict a defendant for mere criminal propensity rather than for

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[17] The court excerbated the undue prejudice generated by the "prior crimes testimony" by refusing to strike the testimony of Peter Scrolla, an agent of the Drug Enforcement Administration stationed in Florida who was permitted to testify that he knew Verzino and the defendants Magnano, Pallatta, Bollella and Carbone from the neighborhood in which he was raised and had seen them in each others company on a number of occasions (R. 2720). In Agent Scrolla's words "they hung out together" (R. 2721). See generally R. 2722-2755. On the other hand, had the prosecution offered Mr. Scrolla's testimony at the outset, the prior crimes testimony offered through Verzino to show "relationship" would have been wholly unnecessary.

[18] See *United States* v. *Bertollotti*, — F.2d — (2d Cir., 1975).

his guilt of the offense charged. *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir., 1975); *United States* v. *Chrzanowski*, 502 F.2d 573 (3d Cir., 1974); *United States* v. *Stirone*, 262 F.2d 571, 576 (3d Cir., 1960), *rev. on other grounds*, 361 U.S. 212 (1960); *Boyd* v. *United States*, 142 U.S. 450 (1892) and Rule 404(b) of the Federal Rules of Evidence. This concept is particularly poignant in a conspiracy case, where, as here, as the result of the admission of the prior bad acts of the defendants Magnano, Pallatta, Bollella and DeLutro, the defendant Lucas was confronted with a hodgepodge of acts and statements by others which he obviously never authorized, intended or knew about; but which helped pursuade the jury of the existence of the conspiracy itself. *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1948); (Jackson, *J.* concurring).

By this mass of remote, irrelevant and inflammatory prior crimes evidence, the jury was overwhelmed with the stench of crime and distracted from the issues in the case. Defendant Lucas, moreover, was confronted with evidence of crimes by and between persons he never had known or seen.

None of the well-known exceptions to prior crimes evidence was applicable to these stories. They did not, for example, tend to prove a larger scheme or plan of which the present charge was a part, as in *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir. 1975), nor did they tend to prove motive or identity. See generally, McCormick, Evidence 449 (2d ed. 1972). Nor did they tend to show the background and development of the conspiracy. *Cf. United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir. 1975).

The only common thread between the crimes testified to and those on trial is that they involved narcotics. But proving prior narcotics crimes by the defendants is the

grossest form of character evidence, *United States* v. *Pucco*, 435 F.2d 539, 542 fn. 9 (2d Cir. 1971). It would be unthinkable to permit a witness in a murder case to testify that he and the accused committed a murder ten or fifteen years ago. Yet there, as here, one could conjure up claims about relevancy. Nor can the theory that the prior crimes evidence supports the credibility of the witness be employed to justify confusion and prejudice. See *United States* v. *Falley*, 489 F.2d 33, 37 (2d Cir. 1973).

These crimes were not and could not have been charged in the indictment. Yet had they been charged, at least the defendants would have had an opportunity to meet them. *Cf. United States* v. *Falley*, *supra*.

The Perna-Verzino testimony relating to other narcotics conspiracies averaging more than 10 years prior to the conspiracy charged, showed mere criminal propensity; were not logically connected to the offense charged and were far too remote to arguably be part of a common scheme or plan of criminal action.[19]

This genre of evidence, as it was introduced through Verzino, Perna and Scrolla showed only a loose pattern of criminal behavior with respect to the general subject of narcotics over a period of 25 years, no nexus was established between this behavior and the scheme alleged in the instant indictment. Certainly no nexus was established between the Verzino conspiracies of the early 1940's, 50's and 60's and the defendant Lucas. Moreover, the evidence, in fact did not establish motive, intent, knowledge or even modus operandi. Instead it painted each of the

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[19] The government's standard argument that the bad acts were logically connected because they showed a general relationship between narcotics dealers in one large plot to possess and distribute narcotics is wholly invalid. See *United States* v. *Bertollotti* and *Kotteakos* v. *United States*, 328 U.S. 750.

defendants as immoral, unscrupulous and greedy individuals with criminal propensities. See generally Weinstein's United States Rules; Vol. 2, secs. 404 (08), 404 (09). The bad acts evidence was thus not relevant and should have been excluded.

The Government's justification for this evidence is obscure. Although at first denying it was "propensity" evidence, the Government referred to it as showing "a pattern of conduct" (A. 67), a distinction difficult, if not impossible to draw. Later, "it was simply a pattern or course of conduct which developed prior to the charge" (A. 67).

The court initially admitted the evidence on the erroneous theory that it was admissible to prove "background and development of a pattern of conspiratorial behavior" (A. 79). See also A. 112.

After most of the evidence was in, and the Government was pressing for more, the Government became even more candid and claimed admissibility to prove a "continuous course of conduct . . . identical with the conduct charged here" (A. 110).

The court finally expressed the view that the Government's theory was "highly dangerous" and "perilous" in that the record was "saturated with evil . . . even more incriminating than the very testimony dealing with the indictment . . . heavy blows that . . . outweigh the totality of the testimony." He expressed fear that the jury was already "so smitten by the force of the prior acts that they are unable to avoid bringing the force of those prior acts into play . . ." (A. 123). We submit the court was correct.

Assuming arguendo that prior uncharged criminal behavior of the defendants did have some relevance in proving something other than criminal propensity, that

evidence, on balance, should have been excluded because its probative value was substantially outweighed by the danger of unfair prejudice; it confused the issues and misled the jury; and was nonessential to the prosecution's case. *United States* v. *Byrd*, 352 F.2d 570 (2d Cir., 1965); *Stirone* v. *United States*, *supra* and Rule 403a of the Federal Rules of Evidence. In short, even if relevant, that relevancy was "entirely obscured by the dirty linen hung on it". *State* v. *Gobel*, 218 P.2d 300, 306 (Wash.) and Rule 403A of the Federal Rules of Evidence.

The problem is not merely one of pigeon-holing or determining whether the evidence offered fits into a category of an exception to the rules, but rather one of balancing the actual need for the other crimes evidence in light of the issues and the other evidence available to the prosecution. *United States* v. *Bozza*, 365 F.2d 206, 213 (2d Cir., 1966); *United States* v. *Brettholz*, 485 F.2d 483, 487 (2d Cir., 1973); *United States* v. *Phillips*, 401 F.2d 301, 305-306 (7th Cir., 1968). It is clear that the probative value of the criminal behavior of Verzino and Perna with several defendants in the late 1940's or even between 1959 and 1966 was far outweighed by the undue prejudice via a spill-over toward the defendant Lucas. The Court below therefore abused its discretion in admitting such evidence. *United States* v. *Weiler*, 385 F.2d 63 (3d Cir., 1967); *McHale* v. *United States*, 398 F.2d 757 (D.C. Cir., 1968), *cert. den.*, 393 U.S. 985 (1968). Cf. *United States* v. *Natale*, 526 F.2d 1160, 1173 (2d Cir. 1975).

The court's charge on prior crimes could not have cured the prejudice. That "prejudicial effects can be overcome by instructions to the jury . . . all practising lawyers know to be unmitigated fiction." *Krulewitch* v. *United States*, 336 U.S. 440, 453 (Jackson, *J.* concurring). See also *Bruton* v. *United States*, 391 U.S. 123 (1968); *United States* v. *Falley*, *supra*, at 38.

The limiting instructions given, moreover, were contradictory and confusing. First, over objection of defendant Lucas, the court told the jury, about the "Rossi rip-off", that Perna's testimony about it "is binding only on the defendant Lucas and not on any other defendant" (A. 53).

Later the court charged as some of the prior crimes evidence was admitted. The charge was incomprehensible (A. 83-87).

Finally, in the main charge, after telling the jury that evidence that "an act was done at one time . . . is not any evidence or proof whatever that a similar act was done at another time . . . ," the court told the jury that it could consider such evidence "solely . . . in determining the background and development of the very conspiracy embraced within the indictment . . ." (A. 321). Defendant cannot reconcile such instructions and it would be more than fiction to suppose that a jury could.[20]

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[20] The Court claimed to have "adapted and adopted" this so-called limiting instruction from *United States* v. *Klein*, 340 F.2d 547 (2d Cir. 1965) (A. 81). Yet *Klein* involved no such instruction. That case held that where the acts alleged to constitute the crime are "susceptible of the interpretation that . . . [they] were innocently performed and the vital issues of knowledge and intent are keenly disputed" the Government may prove closely related offenses demonstrating that the defendant's behavior was not innocent. In such a case, manifestly not this one, the judge should charge that the prior crimes evidence is admissible only to prove intent and not "the actual acts here on trial". *Id.* at 549.

POINT II

The court below erred in admitting in evidence $585,000 in cash seized from the home of the defendant Lucas almost one year after the conclusion of the conspiracy alleged.

In late January, 1975, agents, pursuant to a warrant, searched defendant Lucas' house and found, *inter alia*, approximately $585,000 in cash (R. 2871). The money, in several containers, was introduced into evidence and exhibited to the jury (A. 235-245). Although conceding that the evidence would have a "dreadful impact" (R. 2794), Judge Cooper admitted it in reliance on *United States* v. *Tramunti*, 513 F.2d 1087 (2d Cir., 1975). This was error.

In *Tramunti*, the defendants were charged with a narcotics conspiracy between January 1, 1969 and December 1973. On the night of February 3, 1972, in the midst of the conspiracy, various Federal and State agents seized almost $1,000,000 from the defendant DiNapoli shortly after he had left an apartment which the agents had had under surveillance for some time. See *United States* v. *Tramunti*, *supra* at p. 1098 fn. 16. Moreover, the Court of Appeals in *Tramunti* noted that the evidence at trial, prior to the introduction of the money, established prima facie that there had been many narcotics transactions at the address from which DeNapoli had taken the money. Indeed, the Court found substantial evidence that at the very time DiNapoli was arrested with the money, "a narcotics transaction was in the making" *Id.* at 1101. The "drug activities" at the house from which DiNapoli emerged with the money, together with other facts peculiar to the case, *eg*, that DiNapoli was accompanied by Vincent Papa, regarded as "one of the top narcotics traffickers in the United States", *Id.* at 1101,

warranted the jury in concluding, not only that it was "drug money" *Id.* at 1098 (n. 16), but that it was an instrumentality of a crime taking place before the eyes of the arresting officers. *Id.* at 1104. This, together with the fact that the money was seized during the middle of the conspiracy, warranted an analogy between the money and "special tools or apparatus". *Id.* at 1105.

In *dicta*,[21] the Court in *Tramunti* also recognized that evidence "of *sudden* acquisition of large amounts of money" may be admissible to prove criminal conduct where relevant. *Id.* at 1087 (emph. in original). The Court took pains to emphasize that the key word in the doctrine was "*sudden*". Obviously so, for the mere possession of a large quantity of money is in itself no indication that the possessor had obtained the money unlawfully. See 1 Wigmore, *supra*, at 601. Thus, in the analogous larceny or robbery situations (see *eg. United States* v. *Jackskion*, 102 F.2d 683, 684 (2d Cir., 1939)), when there is no proof of lack of funds prior to the robbery, evidence of possession of money and goods after an alleged robbery or larceny was inadmissible. See also, *People* v. *Orloff*, 65 Cal. App. 2d 614, 151 Pac. 2d 288; *Boston & W.R. Co.* v. *Dana*, 1 Gray 101 (Mass. 1854); cf. *People* v. *Connolly*, 227 Ap. Div. 167, 237 N.Y.S. 303 (1929).

In the instant case there was no proof that the Lucas money was the product of sudden acquisition of wealth. (A. 197-198). Moreover, there was utterly no connection between money seized from Lucas in 1975 and crimes alleged in 1973.

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[21] We do not understand the Court to have found the sudden acquisition doctrine applicable in *Tramunti*, inasmuch as there was no evidence of when the money was acquired by *DiNapoli*. See *United States* v. *Trudo*, 449 F.2d 649 (2d Cir., 1971).

The Introduction Of The Actual Cash Seized Was So Inflammatory So As To Outweigh Its Possible Probative Value.

In *Tramunti*, this Court took special note of the fact that the actual cash seized was not placed before the jury (513 F.2d at 1098, 1105). For that reason, it rejected the defendant's argument that its introduction inflamed the jury so as to prevent a fair trial. Cf. *United States* v. *Falley*, 489 F.2d 33 (2d Cir., 1973). Here, however, the $585,000 was brought into the courtroom by armed guards and laid before the jury. The Judge was no doubt correct in characterizing the scene as having a "dreadful impact" (A. 215).[22]

Rule 403 of the Federal Rules of Evidence states in part:

> ". . . relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."

The Advisory Committee's notes to Rule 403 have defined "unfair prejudice" as "an undue tendency to suggest decision on an improper basis, commonly though not necessarily, an emotional one". See Weinstein's Evidence, United States Rules Vol. 1 pp. 403-415. Thus evidence that arouses a jury's sense of horror, provokes its instincts to punish or triggers other mainsprings of human action should be excluded. See for example, *People* v. *Zackowitz*, 254 N.Y. 192, 172 N.E. 466 (1930); *Lane* v. *State*, 126 Ga. App. 375, 190 S.E. 2d 516 (1972); *People* v. *Jordan*, 23 Mich. App. 375, 178 H.W. 2d 659

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[22] It should be further noted that photographs of the money here in issue were admitted against the defendant in a later trial. See *United States* v. *Tutino* et al., 75 Cr. 1038. The defendant Lucas was there acquitted.

(1970) and *State* v. *Walker*, 33 N.J. 580 (1960). See also, 1 Wigmore Evidence Sec. 57 at p. 456 (3d Ed., 1940). Compare *United States* v. *Ravich*, 421 F.2d 1196 (2d Cir., 1970) in which this Court criticized the admission of a number of pistols seized from bank robbers after a substantial time-lapse. The instant case is *a fortiori*.

Perhaps the point was best made by Professor Wigmore when he noted:

> "There is a general mental tendency, when a corporal object is produced as proving something, *to assume, on sight of the object, all else that is implied in the case about it.* The sight of it seems to prove all the rest. Thus, it is easy for a jury, when witnesses speak of a horse being stolen from Doe by Roe, to understand, when Doe is proved to have lost the horse, that it still remains to be proved that Roe took it; the missing element can clearly be kept separate as an additional requirement. But if the witness to the theft were to have a horse brought into the courtroom, and to point it out triumphantly, 'If you doubt me, there is the very horse!', this would go a great way to persuade the jury of the rest of his assertion and to ignore the weaknesses of his evidence of Roe's complicity. The sight of the horse, corroborating in the flesh, as it were, a part of the witness' testimony, tends to verify the remainder." 7 Wigmore Evidence, § 2129 (3d Ed. 1940) (Emphasis in original).

It is respectfully submitted that Wigmore's prophetic analogy was fulfilled in the instant case.

POINT III

Although the indictment charged a single massive conspiracy to violate the narcotics laws, the trial proof indicated at least three separate and distinct conspiracies. Therefore, the error of prejudicial variance was committed.

Despite this Court's admonition in *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir., 1974), that the Government "cease combining in an alleged single conspiracy, criminal acts loosely, if at all connected," the prosecution sought and obtained this indictment charging that during a period of two years, no less than 20 defendants and at least 7 unindicted co-conspirators bought, sold, processed and distributed heroin and cocaine in violation of the narcotics laws.[23]

Although a detailed account of the events relating to the multiple conspiracies may be found in our statement of facts, a brief summary highlighting the three separate conspiracies would be appropriate.

Viewing the evidence in a light most favorable to the Government, the first conspiracy involved the formation and activities of the Perna-Malizia-Verzino partnership to purchase drugs from the Pallatta group for resale to others including the defendant Lucas. The second conspiracy involved the purchase of pure heroin by the Perna group from the defendant DeLutro; while the third separate and distinct conspiracy involved the sale of pure heroin by Soldano to Verzino in January 1974. No proof was offered to show that the defendant Lucas was ever a link in the distribution of any drugs obtained by the Perna group from either DeLutro or Soldano. On the

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[23] Both the original indictment 75 Cr. 78 and superseding indictment were filed after the *Sperling* decision and admonition.

contrary, it was part of the prosecution's script that the defendant Lucas was one of the ultimate receivers of the narcotics which originated with the Pallatta combine. In short, there was no interaction, mutual dependence or assistance between Lucas on the one hand and the DeLutro and Soldano transactions on the other.

As indicated in *United States* v. *Bertolotti*, — F.2d — (2d Cir., 1975) Dkt. # 75-1107 Slip op. p. 6409, it is now well established within this circuit that "when convictions have been obtained on the theory that all defendants were members of a single conspiracy, although, in fact, the proof disclosed multiple conspiracies, the error of variance has been committed. *Berger* v. *United States*, 295 U.S. 78 (1935); *Kotteakos* v. *United States*, 328 U.S. 750 (1946). See Note, *Federal Treatment of Multiple Conspiracies* 57 Colum. L. Rev. 387, 396 (1957)." *United States* v. *Bertolotti*, *supra* at p. 6417.

Despite the fact that this Court has gone quite far in finding single conspiracies in narcotics cases, the prosecution can no longer take refuge against the multiple conspiracy problem by asserting that a single scheme existed "to place narcotics in the hands of the ultimate users" *United States* v. *Bertolotti*, *supra* at p. 6418. In the instant case, the trial proof revealed at least three separate and distinct conspiracies unrelated in place or participants.[24] The only common thread was that each venture dealt in some way with the purchase or sale of narcotics. However, a bare allegation that all defendants were in some way connected with the distribution of narcotics is not sufficient glue to paste together a number of schemes into a single massive conspiracy for the sake of convenience. *United States* v. *Butler*, 494 F.2d 1246 (10th Cir., 1974); *United States* v. *Miley*, 513 F.2d 1191 (2d Cir. 1975); and *Kotteakos* v. *United States*, *supra*.

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[24] Save the "hub" participants—Perna, Malizia and Verzino.

In short, although an examination of the evidence may reveal a sufficient basis for the jury "to be satisfied beyond a reasonable doubt" that "each of the asserted transactions took place", there was insufficient evidence linking them together in a single overall conspiracy. *United States* v. *Bertolotti, supra* at p. 6419. Indeed the only nexus was Perna and Verzino. "This type of nexus has now been held to be insufficient." *United States* v. *Bertolotti, supra; Kotteakos* v. *United States, supra* at 773-774.[25] Compare *United States* v. *Bernstein*, — F.2d — (2d Cir. 314/76 Slip op. 6631).

Because the indictment charges one overall conspiracy and the proof shows a series of smaller ones, there has been a material variance. It therefore remains to demonstrate the prejudice which occurred to the defendant Lucas because of "the spillover" effect—the transference of guilt from members of one conspiracy to another, as well as the effect of "hearsay" statements contained in conspiracy in which Lucas was not involved. *United States* v. *Bertolotti, supra* at p. 6421; *United States* v. *Miley, supra* at p. 1209; and *Kotteakos* v. *United States* at 774.

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[25] Although at first blush, the proof indicates a "chain conspiracy so familiar in other narcotics cases" which "is dictated by a division of labor at the various functional levels" *United States* v. *Agueci*, 310 F.2d 817 (2d Cir., 1962), the facts herein are more akin to the "spoke" conspiracy condemned in *Kotteakos* v. *United States, supra* and *United States* v. *Borelli*, 336 F.2d 376, 383 (2d Cir., 1964), *cert. den. sub nom.; Cinquegrano* v. *United States*, 379 U.S. 960 (1965). Thus, at the hub of the wheel were Messers Perna and Verzino. At the ends of the various spokes were their many purchasers and suppliers. There was therefore no permissible inference which could be drawn from the nature and scope of the operation that the defendant Lucas was aware of his part in a larger organization where others performed similar roles. This was particularly true with respect to the Soldano and DeLutro transactions. See *United States* v. *Sperling, supra.*

As indicated in *Bertolotti*:

> "It may generally be conceded that the possibility of prejudice resulting from a variance increases with the number of defendants tried and the number of conspiracies proven. *Blumenthal* v. *United States*, 332 U.S. 539, 559 (1947)."

As in *Bertolotti*, consideration of the "numbers involved may be an appropriate starting point for analysis with respect to prejudice." The instant indictments charged 20 defendants and 7 unindicted co-conspirators. Thus at the outset, the number of individuals involved was 27. As a result of unavailability and pleas of guilty, the number of defendants actually on trial was reduced to eight by the time the case went to the jury. "These are impressive figures even when compared with *Kotteakos*" and *Bertolotti*. Compare *United States* v. *Miley*, *supra*.[26] These numbers taken in conjunction with the three separate conspiracies compels a conclusion of patent and inherent prejudice.

The defendant Lucas was subjected to voluminous testimony relating to unconnected crimes in which he took no part. Although Lucas may be charged with receiving drugs from Perna and Verzino which originated with the Pallatta group, he was in no way tied to any of the other conspiracies (*e.g.* the DeLutro and Soldano transactions). Nevertheless, he was forced to sit through days of damaging testimony on the acquisition and distribution of the DeLutro and Soldano heroin.

In short, criminal Mr. Lucas may have been, but his guilt did not permit violation of his "right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others". *United States* v.

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[26] The trial in *Miley* took 5 days while the instant case took approximately 7 weeks.

Bertolotti, supra at p. 6424 citing *Kotteakos* v. *United States, supra* at 775.[27]

Even more prejudicial to defendant Lucas, as argued in Point I, was the massive evidence of prior crimes allegedly committed over the past generation by several of the co-defendants in concert with Perna and Verzino. Had defendant Lucas not been joined in the trial of the alleged single conspiracy, this evidence could not conceivably have come in against him; the Government wouldn't even have had temerity to offer it.

> "No defendant ought to have a jury which is considering his guilt or innocence hear evidence of this sort absent proof connecting him with the subject matter discussed." *United States* v. *Bertolotti, supra.*

POINT IV

The charge was prolix, confusing, contradictory and full of error.

Despite this Court's admonitions in *United States* v. *Clark*, 475 F.2d 240, 250 (2d Cir. 1973), and *United States* v. *Lozaw*, 427 F.2d 911 (2d Cir. 1970), against extemporaneous, rambling charges containing irrelevant asides and needless verbosity, the original and supplemental charges below broke all those rules, bordered on the incomprehensible, and often crossed that line. The original charge consumed 108 pages of transcript (A. 246-354). It produced a welter of questions from the jury, and a supplemental charge of some 63 pages (A. 372-423, 480-492). Both were replete with self-laudatory remarks (A. 251,

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[27] The Court's charge on conspiracy is treated *infra* at pp. 36-37.

252, 255, 260, 319, 389), lessons in history, philosophy (A. 249, 253, 254, 264, 333, 341) and linguistics (A. 278, 389); and numerous examples which often confused more than they clarified (*e.g.* A. 258, 271, 272, 276, 278, 279, 285, 302, 372, 374, 382, 387, 399, 393, 403, 405, 408, 410). There is no doubt that much of the charge was intended to clarify the applicable legal principles; but there is equally no doubt that the charge as a whole was larded with "hypothetical illustrations [that] should be avoided because of the likelihood that they may divert the jury," *United States* v. *Casino*, 467 F.2d 610, 619 (2d Cir. 1972); lacked "balance between brevity and verbosity," and "a logical and orderly organization." *United States* v. *Clark*, *supra*, 475 F.2d at 251. It was bereft of "stylistic caution and verbal restraint," *United States* v. *Lozaw*, *supra*, 427 F.2d at 916, and failed to permit the jury to discharge its responsibility by giving it "the required guidance by a lucid statement of the relevant legal criteria," *Bollenbach* v. *United States*, 326 U.S. 607, 612 (1946). The charge, moreover, was erroneous and contradictory in several vital particulars, as will be noted below.

A. The charge on conspiracy was erroneous, contradictory and hopelessly confusing

1. Definition of conspiracy

In his original charge, Judge Cooper told the jury at least ten times that a conspiracy is a plan of two or more persons to violate the law (A. 271, 275, 278, 279, 280, 291). After deliberations began and the jury evidenced its confusion by asking what constitutes a conspiracy (A. 378), the court told the jury again, at least 6 times, that a conspiracy is a plan (A. 383, 384, 385, 386).

The court also frequently equated conspiracy with "getting together" (A. 271, 278, 285, 383).

While the court did occasionally also refer to a conspiracy as an agreement (A. 273, 281, 283), the nature of the agreement was nowhere clearly defined, and the thrust of both the initial and the supplemental charges was that a conspiracy can exist if two or more people "plan" or "get together" to commit a crime.

In its ordinary meaning, to plan to do something is to intend to do that thing. Parallel intentions to violate the law plainly do not constitute a conspiracy. Williams, Criminal Law: The General Part 667 (2d ed. 1961). Likewise, to "get together," in the common meaning of the words, is simply to associate. Association is not conspiracy. *United States* v. *Kompinski*, 373 F.2d 429 (2d Cir. 1967).

The essence of a conspiracy is agreement; a mutual, reciprocal undertaking for a specific, common, criminal purpose. *United States* v. *Borelli*, 336 F.2d 376 (2d Cir. 1964); La Fave and Scott, Criminal Law 460, 464 (1972). Although an agreement to do something which violates the law is required, a conspiracy is more than that; it is an agreement to obtain a common objective by concerted action. The objective is not to violate the law but to accomplish something which necessitates that the law be violated. That "something," the objective of a conspiracy, exists in the world; it is not an abstraction such as "violation of law." See *id.* at 664; *Developments in the Law: Criminal Conspiracy*, 72 Harv. L. Rev. 920, 929-923 (1959); *United States* v. *Gallishaw*, 428 F.2d 760, 763 (2d Cir. 1970).

Moreover, the mere fact that a number of individuals intend to commit similar crimes and communicate that intent to each other does not make them co-conspirators:

> "If A combines with X to commit one burglary and B combines with X to commit another, the three are not necessarily involved in a single con-

> spiracy to violate the burglary statute, even though A and B are aware of X's agreement with each. A single conspiracy can be found, however, if each individual's success depends upon the continued operation of the central core and this in turn depends upon the success of all the individuals, so that each individual can be said to contribute to all the separate physical objectives." Developments, *supra*, at 933.

The criminal act of modern conspiracy is

> "the act of agreement . . . that is, the continuous and conscious union of wills upon a common undertaking. While this act is not physical, it still goes beyond the completely internal and subjective act of intending. It requires on the part of each conspirator communion with a mind and will outside himself, and it must be . . . a communication of common intention and assent . . ." *Id.* at 926.

Of course an agreement need not be proven by verbal communication, and it may be inferred from circumstances, but

> "in their zeal to emphasize that the agreement need not be proved directly, the courts sometimes neglect to say that it need be proved at all." Developments, *supra*, at 933.

That is essentially what happened below.

The jury should have been cautioned that "regardless of the kind of evidence or method of proof, they must be convinced of an actual agreement in the sense of a meeting of minds in pursuit of a course of action according to a common plan. . . ." Cousens, *Agreement As an Element of Conspiracy*, 23 Va. L. Rev. 898, 910 (1937).

The court's charge left nothing for the jury to decide. It failed to draw distinctions between plans or intentions and agreements; wholly failed to include the essential notion of concert, reciprocity, or cooperative endeavor, and failed totally to inform the jury that the requisite common objective was something in the real world. As defined by the court, all persons are part of a single conspiracy who intend to commit crimes. This reduces the concept of conspiracy to an absurdity.

2. Evidence of a defendant's membership in the conspiracy

Although charging the jury that, in determining whether a defendant joined a conspiracy, it must look at a defendant's "own conduct—that is, what he himself knowingly said or did" (A. 4068), this charge was buried by a congeries of contradictory ones. At least five times the jury was told that it could determine whether or not a defendant joined a conspiracy by all the evidence in the case. "The only way you have of answering or arriving at the state of mind of a defendant . . . is to take into consideration all the fact and circumstances shown by the total evidence" (A. 290); ". . . whether or not a defendant was a member of a conspiracy may be determined upon . . . all the evidence in the case . . ." (A. 394). See also A. 286, 288, 399. Several objections were taken to these charges (A. 346, 423, 424), to no avail.

The court's charges were wrong. A defendant's membership in a conspiracy can be proved by, and only by, his own words or conduct. *United States* v. *Borelli*, 336 F.2d 376 (2d Cir. 1964); *United States* v. *Stromberg*, 268 F.2d 256 (2d Cir. 1959). The jury should have been unequivocally so instructed. 1 Devitt & Blackmar, Federal Jury Practice and Instructions § 29.05 (1970). See also, *United States* v. *Tramunti*, 513 F.2d 1087, 1107 (2d Cir. 1975).

This Court quoted approvingly a somewhat similar charge by Judge Cooper in *United States* v. *Jacobs*, 431 F.2d 754, 761 (2d Cir. 1970). However, the charge was not under attack in *Jacobs*. Rather, appellants complained of the court's refusal to charge that a defendant can't be convicted solely on the assertions of a co-conspirator. The Court held the matter adequately covered.[28]

It will simply not do to say, as has been said elsewhere, that this charge was "if anything, more favorable to appellants than that to which they were entitled;" *United States* v. *Sisca*, 503 F.2d 1337, 1345 (2d Cir. 1974), for the charge is nonsensical and contradictory. The jury either determines membership in a conspiracy on what each defendant said or did or it determines such membership on "all the evidence in the case." It cannot do both. Contradictory rules are not only bad law, they aren't law at all. Fuller, The Morality of Law 39 (1963).

To impose upon a jury contradictory obligations is to invite chaos and lawlessness, and to create unanswerable doubts not only as to which rule the jury followed but as to whether it followed any rule at all.

It is not necessary, in order to implement the ruling of *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), that the jury be given a contradictory instruction. The

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[28] The issue was adequately covered in *Jacobs* in light of the following supplemental charge:

> "To be absolutely clear on the facts of this case, there is no conspiracy, and neither Jacobs nor Spieler can be found to be a member of a conspiracy unless and until you find beyond a reasonable doubt that both Jacobs and Spieler were members of the conspiracy. Accordingly, neither the words nor the acts of either Jacobs or Spieler are chargeable to the other unless and until both of them have gotten together with each other in the conspiracy charged." 431 F.2d at 761 (n.8).

Geaney rule, that after the judge has determined a defendant's membership by a preponderance, he can permit the jury to consider all evidence to determine guilt beyond reasonable doubt, may still be given effect, simply by giving the "own words and acts" charge and leaving the matter alone.

If the hearsay of a co-conspirator has a tendency to establish another's membership—which may often be doubted—the jury can be trusted to give it such an effect without an instruction to do so. It is submitted, moreover, that the probative force of co-conspirator hearsay, in lifting the Government's proof from a preponderance to beyond reasonable doubt, is simply and solely relevant to the judicial function of determining the sufficiency of the evidence. It should play no part in the jury's instructions.

3. Responsibility for acts and statements of co-conspirators

Judge Cooper repeatedly, in his initial and supplemental charges, told the jury that a defendant who joins a conspiracy adopts as his own the past and future words and acts of all other conspirators (A. 289, 292, 398). The jury was even told that "a defendant assumes all the liabilities of the partnership, including those that occurred before he became a member even" (A. 402). Further, "he is bound by the acts of everybody done in or outside of his presence . . ." (A. 284-285).

> "That is another way the law says, 'If you do it, mister, don't come in here crying you didn't know that the other fellow went that far, or went in that direction, or did this or that; you are bound by it whether you know it or not, as long as it was done in furtherance of the very objective of the conspiracy that you, mister, knew about and participated in, were a willing member of'" (A. 285).

When these patently erroneous charges, which were objected to (A. 345), were combined with the court's definition of conspiracy as a plan to violate the law, and further combined with the accessory charge (A. 313-315) and the *Pinkerton* charge (A. 316), the result is simply mind-boggling. If Frank Lucas planned to violate the narcotics laws, and X also planned to do so, then Frank Lucas is guilty of any substantive offense committed at any time, past or future, by anyone else with a similar plan or who was aided and abetted by anyone else who shared the plan. In short, if Lucas at any time planned to possess or distribute narcotics, he is guilty of all the crimes committed by Perna and Verzino. Their stories about supplying Lucas with heroin could be disbelieved, yet the jury could convict Lucas if it believed that they, or either of them possessed heroin on the dates charged in the indictment and that Lucas, at some past or future time planned to possess narcotics. Numerous objections were made to these charges (A. 345-346) but rather than being corrected, they were repeated (A. 392, 397-400), again over objections (A. 422-424).

The net effect of these instructions was to set loose a lawless jury, authorized to convict if there was crime in the air.

It is bad law, but not without support, that *evidentiary* use can be made of words and acts predating a defendant's entry into the conspiracy, see *Developments*, *supra* at 986, but that was not the purport of the court's charge. It would clearly violate Due Process to convict a defendant for a substantive crime committed by someone else before the defendant had any connection whatever with the perpetrator, yet that was what the jury was invited to do, and could have done under this charge.

4. The charge on single conspiracy was inadequate

A conspiracy was repeatedly defined as a plan, etc. to "accomplish something unlawful" (A. 284) or to "violate a federal law" (A. 271), or "do an unlawful act" (A. 275). The court then said that a defendant must be proved a member of the conspiracy charged in the indictment and not "some other conspiracy" (A. 300). In the guise of guidance in making this decision, however, the court merely stated that there was one conspiracy if the conspiracy "had the same overall primary purpose and . . . nucleus of participants" (A. 301).

It is difficult, if not impossible, on these charges, to see how a jury could help but find a single conspiracy in every case where the defendants were or intended to be engaged in some phase of the narcotics business, for they would share a purpose to violate the narcotics laws; and nothing more is required under the charge, if that.

Although the difference between single and multiple conspiracies is not easily articulated, see *United States* v. *Bertolotti*, — F.2d — 2d Cir. Nov. 10, 1975 (Dkt. 75-1107, sl. op. 1196); *United States* v. *Miley*, 513 F.2d 1191 (2d Cir. 1975), more was manifestly required to make the charge meaningful.

Had the court properly defined conspiracy, this charge might have sufficed. In absence of a real definition, however, it was incumbent on the court to apprise the jury that to find a single conspiracy they should find that

> "all the accused were embarked upon a venture, in all parts or which each was a participant, and an abettor in the sense that the success of that part with which he was immediately concerned was dependent upon the success of the whole" *United States* v. *Bruno*, 105 F.2d 921, rev'd on other grounds, 308 U.S. 287 (1939)

Without some such guidance, the charge was vacuous.

Here, unlike in *United States* v. *Bynum*, 485 F.2d 490 (2d Cir. 1973), there was no meticulous charge on the "elements and characteristics of the single conspiracy," *id.* at 497, so that the charge on multiple conspiracies was meaningless. It is thus wholly misleading to compare this small portion of the charge with those in *Bynum*, or *United States* v. *Tramunti*, *supra*, 513 F.2d at 1107. There are surface similarities but, in context, gross differences. The defect here, which was not present in *Bynum* or *Tramunti*, was the total absence of a meaningful, coherent definition of single conspiracy. The issue in those cases, on the other hand, was whether the charge properly instructed the jury as to its duty in the event multiple conspiracies were found.

5. The court erroneously and improperly lectured the jury on the dangers of conspiracy

In the course of charging on the meaning of "conspiracy," the court exhorted the jury on the evils thereof. The judge began by referring to an "ugly creature with its tentacles. Once those tentacles begin to spread, it takes time to lop off every one of those tentacles" (A. 279).[29] He continued to opine that "the law says that it is harder to detect, that combination, than the wrongdoing of the lone wrongdoer" (A. 280).[30]

> "Concerted action for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which an individual acting alone could accomplish. Group association increases the likelihood . . . that the criminal objective will be successfully realized and renders

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[29] The monster metaphor was alluded to at least three times (A. 278, 279, 283).

[30] This was reiterated in the supplemental charge (A. 306).

> detection more difficult than the instance of a sole aggression" (A. 280).

Although there are *dicta* from respectable sources espousing such a theory as a rationale for conspiracy, see, *e.g. Callanan* v. *United States*, 364 U.S. 587 (1961), common sense requires recognition that the opposite is also often true. Enlarging the number of participants in a crime frequently increases the likelihood of detection rather than reducing it. *Cf.* the present case.

The prejudice in the court's lecture to the jury, however, was not merely that it was so oversimplified as to be wrong, but that it (1) was none of the jury's business; (2) may have influenced the jury to disregard its (inadequate) instructions to convict only on proof beyond reasonable doubt because of the great danger to society inherent in the "ugly creature" called conspiracy; (3) needlessly added to the prolixity and complixity of the charge (as did at most of the court's examples, stories, preachments).

A similar lecture was delivered to the jury by Judge Cooper in *United States* v. *Lozaw*, 427 F.2d 911 (2d Cir. 1970). While not finding it reversible error, this court said:

> "The exercise of stylistic caution and verbal restraint would have made it unnecessary to consider whether there was a risk that the jury might have been tempted to decide issues on extraneous standards instead of legal ones" *Id.* at 916.

Here, unlike in *Lozaw*, the risk was enormous and the lecture was delivered in the teeth of this Court's admonition. See also, *United States* v. *Casino*, 467 F.2d 610, 619 (2d Cir. 1972).

B. The court erred in giving the Pinkerton charge

Here, as in *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), the *Pinkerton* charge (A. 315) should not have been given. See also, *United States* v. *Miley*, 513 F.2d 1191, 1208 (2d Cir. 1975). Here, as there, the evidence of conspiracy is inferred from the substantive offenses rather than the reverse. 506 F.2d at 1342.

Pinkerton v. *United States*, 328 U.S. 640 (1946) involved two brothers who were moonshiners. Conspiracy, in the sense of an agreement, a partnership in an ongoing business venture, was a fact, not a fiction, as it is here, at least under the conspiracy charge given below. It is one thing to extend accessory liability to a venture like that in *Pinkerton*, where the parties were partners in the plain meaning of the word; it is quite another to enlarge liability by piling one fiction atop another, where the defendants for the most part don't know each other, have never communicated in any sense of the word; who quite plainly are unaware of each other's existence, who have no real stake or interest in or knowledge of the others' activities.

Furthermore, the substantive offenses committed by one of the Pinkertons were the specific objects, the goals of the brother's conspiracy. Here, the alleged conspirators were for the most part not only indifferent to and uninterested in the substantive violations by the others, they were ignorant of the same. *Pinkerton* v. *United States* was limited to substantive offenses which were "a part of the ramifications of the plan which could . . . be reasonably foreseen as a necessary or natural consequence of the unlawful agreement" 328 U.S. at 648. There was no such limitation on the charge given below, which was objected to (A. 4122). See also the cogent criticism of *Pinkerton* in Developments, *supra*, 72 Harv. L. Rev. at 995; La Fave and Scott, Criminal Law 513-516 (1972).

It can hardly be said, as it was in *Sperling*, that the charge was nonprejudicial. It not only compounded overwhelming confusion, it permitted the jury to convict defendants like Lucas on the substantive offenses notwithstanding the jury's disbelief of the accomplice testimony regarding those offenses, for as argued in point A. 3 *supra*, if the jury believed that Lucas conspired with Perna or Verzino, and that either of them possessed narcotics on the relevant dates, it could convict even though it disbelieved the testimony regarding specific transactions with defendant Lucas. Furthermore, since the charge on conspiracy was inadequate, defendants could theoretically have been convicted of the substantive offenses on nothing more than a finding of intent to commit a crime.[31]

Confusion was multiplied when combined with the charge that all conspirators are bound by the *past acts* of other conspirators (see point A. 3 *supra*). This permitted the jury to apply the *Pinkerton* charge *retroactively*, and to convict of substantive offenses committed by Perna, Verzino, or others even prior to an accused's joining the conspiracy.[32]

C. The court's charge on accomplice testimony was inadequate and erroneous, and the prejudice therefrom was compounded by improper remarks by the Judge during cross-examination of Perna

The defense requested the customary accomplice charge, based upon *United States* v. *Padgent*, 432 F.2d 701, 704

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[31] The court's *Pinkerton* charge was literally limited to counts 2, 3, 4 and 9 (A. 316), but the jury was *not told* that the *Pinkerton* principle was inapplicable to other counts or other defendants.

[32] This specific point was made in an objection to the charge (A. 345).

(2d Cir. 1970), and approved numerous times in this Circuit. *United States* v. *Projansky*, 465 F.2d 123, 136 (n.25) (2d Cir. 1972); *United States* v. *Gonzalez*, 488 F.2d 833 (2d Cir. 1973). (Bolella request no. I.) No such charge was given. Instead, the court delivered a two page exhortation on the necessity of using accomplices, the fact that truth often comes from unlikely sources ("sometimes a veritable avalanche of convincing discloses gushes forth") (A. 325). Stuck on, as an apparent afterthought, was that such testimony "should be viewed with caution, must be scrutinized with the utmost circumspection." This was not enough. *Padgent* rules that an accomplice's testimony is "inherently suspect" because he may

> "have an important personal stake in the outcome of the trial. An accomplice so testifying may believe that the defendant's acquittal will vitiate expected rewards that may have been either explicitly or implicitly promised him in return for his plea of guilty and his testimony."

432 F.2d at 704. Here, as in *United States* v. *Gonzalez*, 488 F.2d 833 (2d Cir. 1973), the accomplice charge was seriously diluted and at best "left the jury confused." *Id.* at 836. Moreover, it virtually reached the vanishing point when, some ten pages later, the court spoke about the defendant as a witness. There, the court told the jury, as it had refused to tell it about accomplices, that "interest creates a motive to give false testimony . . . and that the interest of a defendant in the result of a trial is of a character possessed by no other witness . . . (A. 335). Having spotlighted the inherent bias of defendant witnesses, it was especially incumbent on the court to do so with respect to Perna and Verzino. It was not done, and exceptions were noted (A. 348, 350).

The prejudicial effect of the court's refusal to give the requested charge was exacerbated by the fact that during

the cross-examination of Perna, the judge virtually testified on a key issue concerning Perna's sentencing expectations. Counsel for Lucas brought out that when Perna pled guilty before Judge Cooper, the Judge told him "I am not giving you the maximum but I have to tell you what the maximum is so that you will know what you are up against . . ." (R. 1322). Judge Cooper then told the jury at length what those remarks meant, an issue on which the record was entitled to speak for itself.[33] As in *Gordon* v. *United States*, 344 U.S. 414,

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[33] The entire remarks, and defendant's ensuing objections, were as follows:

> The Court: I think that since counsel has raised it, and he had a perfect right to raise it, and it touched on the credibility of the witness, that is one device, but I think the jury is entitled to know that when a defendant pleads guilty the law says that the judge should make very clear to him so that he knows what is entailed, just what the maximum of the crime may bring.
>
> There are various and different maximums, depending on what Congress has enacted, and at the time of taking the plea the judge must feel assured that the defendant understands completely everything that is taking place.
>
> Now, in order to explain to a defendant what the maximum is, I differentiate between what the law says and what may ensue. The judge hasn't the information concerning a defendant on the day he pleads. All he knows is what the charge before the Court is, and all the judge has to do on such an occasion is to be assured that the defendant knows the charge and what it means when he pleads guilty.
>
> Now, the date for sentence is usually four, five, six weeks thereafter. During that time the Court gets a report on the defendant who has pled guilty. Then the sentence takes place after such a detailed report is placed before the Court.
>
> Now, what Mr. Hoffman is referring to what took place at the time of the plea, not at the time of sentence. The sentence has not yet been meted out and it may not be meted out for weeks.

[Footnote continued on following page]

422 (1953), where statements were made to the prosecution witness by a federal judge, "The question for [the jury] is not what was intended by the [statements] . . . [but] what effect they . . . had on the mind and conduct of [the witness] whose plea of guilty had put him in large measure in the hands of the speaker." It was thus wholly improper for the judge to interpret his own remarks to Perna.

The obvious impact of Judge Cooper's remarks was not merely to destroy any possibility that the jury may have inferred from "I'm not giving you the maximum . . ." that *Perna* understood that literally, but that there was a serious possibility that Judge Cooper would in fact give Perna the maximum, and that Perna realized this. Furthermore, Judge Cooper's remarks were interpretable by the jury as denying that Perna's testimony for the Government would be considered by the judge in mitigating Perna's sentence.

Lest it be claimed that defendant is reading too much into the remarks, it should be noted that they built upon an earlier series of leading questions put to Perna by the judge (R. 1067-70):

> I hope I have made that clear.
> We will take a short recess.
>
> * * * * *
>
> Mr. Hoffman: At this time I would move for a mistrial based upon the fact that the court instructed the jury as to what occurred factually at the time of the plea of Mr. Perna, and I believe that the only factual evidence that should be before the jury are those matters which go in evidence during the trial. I respectfully so move.
>
> The Court: The Court felt obligated to do so. In the Court's opinion you tried to twist those words into a promise and there was no promise. That is the reason the Court did it. Your motion is denied (R. 1324-25).

The Court: Mr. Perna, there has been talk about a plea by you to a narcotics violation of federal status, and you have admitted freely that you have pled guilty? Is that not so?

The Witness: Yes, sir.

The Court: In connection with a charge of this very same indictment that we are now hearing proof of at this time? Isn't that so?

The Witness: Yes, sir.

The Court: And you know that when you pled guilty, you pled guilty not only to one count, not only to two counts, you pled guilty to three counts, did you not?

The Witness: Yes, sir.

The Court: And you know that the maximum for each of those counts is 30 years in jail? Isn't that so?

The Witness: Yes, sir.

The Court: And you are well aware that theoretically the Judge could hand you 90 years, if he was so minded?

The Witness: Yes, sir.

The Court: Is that it?

Mr. E. Panzer: May I correct one thing, and most respectfully: It is my understanding that he pled guilty not to violations in this case, but to violations with respect to the sale in New Jersey.

The Court: Now, look here, sir, I want to straighten that all out and get it over with. I don't want the jury misled. That is all I care about, what they are getting.[34]

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[34] The remarks continue:

The United States government has prosecuting offices in every part of the country. Right here in New York you have the United States Attorney for the Southern District of New York. Whatever matters he has he brings right here before the judges of this court. But a judge of

[Footnote continued on following page]

this court is not just a local judge. I go to other parts of the country and I preside as a federal judge. That is the Constitution of the United States. It is not a state matter; it is the federal government. So I can sit in San Francisco, Tulsa, Rhode Island, New York, anywhere.

Now, Mr. Perna was arrested in connection with a violation, alleged violation of the federal narcotics laws. He was indicted in New Jersey, and that indictment is exactly the indictment that he pled guilty to before me the other day. The United States government has a perfect right with the consent of the court and with the consent of the attorney representing a defendant to transfer a case to any part of the United States. If I think a case should be tried in Oklahoma because there are better facilities for that particular case, I will direct an order that the case be tried in Oklahoma. There is no mystery about that. And so what they did, because Perna was going to be a witness in this case before you, the representatives of the United States, the prosecutorial staff, that is, the United States Attorney in New Jersey, the United States Attorney here in New York, agreed that it would be to the best interests of all parties that the matter relating to Jersey be made a matter in New York. The law provides for that.

So that he could have pled guilty there; he could have pled guilty before me here, which he did. But there is nothing unusual about it. Both of the United States government representatives signed the stipulation, said, in effect, the prosecutor in Jersey said, "I consent that the charges against Perna be transferred to New York, and the New York representative said, "I consent to take it." That is all in writing, it has been all before me. There is no mystery about it. The judge in New Jersey can take it; the judge in New York can take it.

And so I want no mystery about this. Have I made myself clear to all of you? That is the end of that. I don't want anymore uncertainty injected into this.

Q. What was your understanding, Mr. Perna, that if the case was transferred here you could work out an arrangement with the government?

Mr. Amorosa: I object to the form of that.

The Court: What counsel is getting at, you expected by this transfer from New Jersey to New York you might be able to get consideration for your efforts in connection with the government's case? Is that so or not?

The Witness: Yes, sir.

The Court: Next question (R. 1070).

Although these remarks related directly to Perna, they were in large measure applicable to Verzino as well. The result was that the jury got a wholly misleading picture of what Perna and Verzino expected to gain by their testimony.

As the Supreme Court noted long ago:

> "Under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and . . . his lightest word is received with deference, and may prove controlling." *Starr* v. *United States*, 153 U.S. 614, 626 (1894).

The trial judge may, of course, "analyze and dissect the evidence, but he may not either distort it or add to it." *Querica* v. *United States*, 289 U.S. 466, 470 (1933). And where, as here, the Government's case rested almost entirely on the testimony of accomplices, it was particularly important for the judge to avoid the appearance of partisanship, *United States* v. *Nazarro*, 472 F.2d 302, 310 (2d Cir. 1973); *United States* v. *Coke*, 339 F.2d 183, 186 (2d Cir. 1964); *United States* v. *Grunberger*, 431 F.2d 1062, 1066 (2d Cir. 1970); *United States* v. *Guglielmini*, 384 F.2d 602 (2d Cir. 1967). See also, *United States* v. *Woods*, 252 F.2d 334 (2d Cir. 1938); *United States* v. *Fernandez*, 480 F.2d 726, 737 (2d Cir. 1973). Since the remarks not only implied partisanship but distorted and added to the evidence on a crucial issue, reversal is required. *United States* v. *Fernandez*, *supra*; *United States* v. *Nazarro*, *supra*.

Moreover, where the Government's case rests on two accomplices, failure to give the requested accomplice charge is "substantial" error which might alone require reversal. *United States* v. *Masino*, 275 F.2d 129 (2d Cir. 1960); *Tillery* v. *United States*, 411 F.2d 644 (5th Cir. 1969) (reversible error); *United States* v. *Davis*, 439

F.2d 1105 (9th Cir. 1971) (reversible error); *United States* v. *Gonzales*, *supra*. When "taken together" with the prejudicial comments and questions, "there can be no doubt that [defendant] was not accorded the fair trial to which he was entitled." *United States* v. *Masino*, *supra*, 275 F.2d at 133.

D. The charge on reasonable doubt was erroneous and confusing

Reasonable doubt was defined in just over two pages, a mere 1% of the charge. The definition of this crucible of Due Process was both confusing and wrong.

The error began when reasonable doubt was defined as "a doubt founded in reason" (A. 277). This court has disapproved an analogous definition, since it may suggest to a juror that he is obliged to articulate a reason for his doubt. See *United States* v. *Davis*, 328 F.2d 864, 867 (2d Cir. 1964). In itself that would not have been serious error. However, the judge further charged the jury that it had no reasonable doubt and should convict if

> "you are satisfied of the guilt of a defendant, . . . you do have an abiding conviction of his guilt which amounts to a moral certainty—I mean such conviction or certainty as you would *be willing to act upon in important and weighty matters in your own personal affairs in your own private lives* . . ." (A. 269) (emph. supp.).

To the extent that this portion of the charge is intelligible, it is one of those "willing to rely and act upon it" definitions which the Supreme Court disapproved as creating confusion more than twenty years ago, *Holland* v. *United States*, 348 U.S. 121, 140 (1954), and which this court has repeatedly disapproved. *United States* v. *Bilotti*, 380 F.2d 649, 654 (2d Cir. 1967); *United States*

v. *Nuccio*, 373 F.2d 168, 174-5 (2d Cir. 1967); *United States* v. *Hart*, 407 F.2d 1087 (2d Cir. 1969).

It is simply not the law that a person should be convicted of a serious crime if the jurors feel about his guilt the same they might reluctantly risk the purchase of a used car. Yet that, in essence, was the message conveyed. See *Scurry* v. *United States*, 347 F.2d 468, 470 (D.C. Cir. 1965).

Furthermore, defining reasonable doubt in terms of "moral certainty" is inadequate by itself. *Cf. United States* v. *Johnson*, 343 F.2d 5, 6 (2d Cir. 1965); *United States* v. *Hart*, *supra*. Here, as in *People* v. *Garcia*, Cal. App. (Calif. Ct. App., 1st Dist. 12/29/75), 18 CRL 2450 (Feb. 25, 1976), the trial judge charged about "moral certainty," but went on to water it down. It was reversible error in *Garcia* for him to add:

> "doubt based upon reason, doubt that presents itself in the minds of reasonable people who are weighing the evidence in the scales, one side against the other, in a logical manner in an effort to determine wherein lies the truth"

This is hard to distinguish from the dilutive language employed by Judge Cooper.[35]

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[35] Compare these portions of the charge: "There is a doubt founded in reason, not imaginary, but founded in reason, and arising out of the nature of the evidence in the case or the lack of evidence in the case. It means a doubt which a reasonable person has after carefully weighing all the evidence . . . a doubt which appeals to your reason . . . and arising from the state of the evidence. A defendant is not to be convicted on suspicion, conjecture, or even impressive evidence which does not rise to the dignity of significant persuasiveness" (A. 268).

* * * * *

"In your search for the truth, you should be guided by . . . common sense . . . Out of the welter of testimony you are called upon to determine the factual issues in the case. Thus, upon all the evidence, you, the jury, are to resolve the conflict" (4106).

Confusion and error were compounded when the Government's burden was equated with "significant persuasiveness" (A. 268).

Nor did the charge as a whole fairly convey the Government's burden. It was heavily biased against the defense. The jury was told no less than four times that it is *not* all possible doubt (268-269). They were also told it is *not* a doubt which is "shadowy," *not* "caprice, whim, or speculation," *not* "sympathy," (273) *not* "positive certainty," *not* "mathematical certainty" (269). When this mass of negatives was combined with the implied duty to supply a reason for a doubt, the license to convict on "significant persuasiveness" or on a belief sufficient to act upon in "weighty matters in your own personal affairs," little was left of the Government's burden.

Exception was noted to the charge on reasonable doubt, and a specific request was made to charge that a reasonable doubt "is such a doubt as would cause the jury to hesitate to act in matters of importance in their own lives" (A. 345), which is the correct form of the misleading "willing to act" charge the court gave, *Holland* v. *United States*, 348 U.S. 121, 140 (1955); *United States* v. *Bilotti*, *supra*; *United States* v. *Hart*, *supra*, and which had also been requested by the Government (G. Request 2a).

No principle of law is more fundamental than the requirement of proof beyond reasonable doubt. Watering the concept in a charge, as in that below, undermines that principle, a practice decried in *In re Winship*, 397 U.S. 358, 364 (1970), where the Court said, "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

POINT V

The District Court erred in denying the defendant's motion for a new trial, without an evidentiary hearing.

The prosecution's script was that Mario Perna, Anthony Verzino and another acted as middlemen in the purchase and sale of heroin and cocaine between March 1973 and February 1974. One of the main thrusts of the defense was to discredit these two witnesses by demonstrating, among other things, that both had lied to the authorities even after their arrests and purported offers to cooperate. Although the defense had some success with respect to Verzino, the government was able to portray Perna as a witness who had truthfully and candidly assisted the government from the time of his recapture after attempting to escape from Federal Detention Headquarters in New York.[36]

On November 11, 1975, following the conclusion of the trial, the government for the first time revealed three separate statements given by Perna to members of the F.B.I. following his recapture and arrest in October, 1974.[37] These statements (three detailed accounts of the planning and escape from the Federal House of Detention) demonstrate beyond peradventure that Perna committed perjury during the course of the instant case[38] and that,

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[36] The government was even permitted, over objection to recall Perna to testify as to prior consistent statements to negative a defense theory of recent fabrication. (See e.g. R. 81, 1267 and 1810). See also the prosecutor's summation (R. 3724-25 and 3758-59).

[37] These statements may be found in appellant Lucas' appendix at (A. 613-636).

[38] Thus at trial Perna maintained that he planned to escape from West Street only after he learned in August, 1974 that Verzino was cooperating:

> Q. Did there come a time, Mr. Perna, when you believed and Malizia believed that Verzino began to cooperate with the authorities? A. Yes sir.

[Footnote continued on following page]

contrary to the prosecution's assertions on trial, Perna repeatedly lied in an attempt to deceive the prosecution after his recapture in October 1974. Had this *Brady* material been made known to the defense, it could have been used as one of the "capstones" of its cross-examination to demonstrate that Perna was a master of deception. Moreover the prosecution's portrayal of Perna as a penitent narcotics dealer now to be trusted and believed would have been severely damaged.

Despite the "materiality" of the Perna documents, the trial court without permitting an exposition of the facts in an "adversarial context", denied a new trial without a hearing.

Inasmuch as the Perna material constituted both Jencks Act Material (18 U.S.C. 3500), and evidence favorable to the defense, the court below was compelled to conduct a hearing in an "adversarial context" on the issue of inadvertance and upon such hearing to grant a new trial. *United States* v. *Hilton*, 521 F.2d 164 (2d Cir. 1975).

The legal standards to be applied in determining whether a new trial should be granted on governmental nondisclosure of Jencks Act or *Brady* material is now well settled in this circuit. See, *United States* v. *Hilton*, *supra*, and the cases cited therein. Thus, if the Government *deliberately* suppresses evidence or ignores evidence of such high value that it could not have escaped its attention,

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Q. When was that? A. In August of 1974.

* * * * *

Q. Subsequent to the time you learned that Verzino was cooperating with the authorities, what did you and Ernest Malizia do? A. We planned an escape out of Federal Detention House (R. 916-918).

On the other hand, Perna's suppressed statement to the F.B.I. indicate he began carrying out his plan to escape from the Spring of 1974, long before he learned of Verzino's intention (A. 618, 624).

a new trial is warranted if the evidence is *merely material or favorable to the defense.*[39] *United States* v. *Hilton*, *supra*; *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir. 1972); *United States* v. *Keogh*, 391 F.2d 138, 146-47 (2d Cir. 1968); and *United States* v. *Morell*, — F.2d — (2d Cir. 8/29/75, Docket #74-1827, slip op. 5878, 5879). If on the other hand, the Government's failure to disclose is merely inadvertent or negligent, a new trial is required if there is a significant chance that this added item, developed by skilled counsel, could have induced a reasonable doubt in the minds of enough jurors to avoid conviction. *United States* v. *Rosner*, 516 F.2d 269 273 (2d Cir.); *United States* v. *Morell*, *supra*; *United States* v. *Seijo*, 514 F.2d 1357, 1364; *United States* v. *Sperling*, 506 F.2d 1323, 1333 (2d Cir. 1974); and *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir. 1969).

In the instant case, the Perna material was both material and favorable to the defense. It undercut the stability of one of the two linchpins of the government's case. *United States* v. *Badalamente*, 507 F.2d 12 (2d Cir., 1974); *United States* v. *McCrane*, — F.2d —, Dkt. #75-1643 (3d Cir., 12/18/75). *Giglio* v. *United States*, 405 U.S. 150 (1972); *United States* v. *Duardi*, 384 F. Supp. 261 (D.C. W.D. Mo. 1973) Govt. Appeal dismissed, 514 F.2d 545 (8th Cir., 1975) and *United States* v. *Morell*, *supra* (Friendly, *J.* dissenting); *United States* v. *Seijo*, *supra*, and *United States* v. *Badalamente*, *supra*.[40]

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[39] Deliberateness has been equated with gross negligence. See *United States* v. *Miller*, 411 F.2d 825 (2d Cir., 1969); *United States* v. *Consolidated Laundries*, 291 F.2d 563 (2d Cir. 1961).

[40] The fact that the material suppressed concerned only the credibility of a witness and not facts going directly to the guilt or innocence is not dispositive. *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Miller* v. *Pate*, 386 U.S. (1967) and *United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135 (1964).

In *United States* v. *Hilton, supra,* a case similar to the one at bar, the prosecution had failed to divulge a letter written by one of its key witnesses to the prosecutor. In the letter the witness Avon White wrote asking the United States Attorney for help transferring him from one prison to another. This Court, at the suggestion of the Government remanded the case for an evidentiary hearing on the issue of deliberateness. After a hearing during which Hilton was not adequately represented by counsel, the District Court denied his motion for a new trial. This Court reversed and held:

> "However, the issue before us is more than reviewing the trial court's determination of whether a reasonable doubt would have been induced in the jurors. Before we can apply the reasonable doubt standard we must determine whether the trial court was correct in concluding that the suppression was inadvertent. *Our interest in enforcing the prophylactic rule requiring that a new trial be granted in cases of deliberate nondisclosure dictates that the facts surrounding the nondisclosure be developed in an adversarial context*" (emphasis supplied).

See also, *United States* v. *Morell, supra,* and *United States* v. *Pacelli,* 491 F.2d 1108, 1109 (2d Cir., 1973).

In sum, applying the prophylactic rule of this circuit with respect to non-disclosure of evidence, this Court should order a new trial or in the alternative, remand this case for a full adversarial hearing on the issue of deliberateness and materiality.

POINT VI

The court denied defendant the right to be represented at all stages of the proceedings.

The case was called on September 22, 1975. Defendant Lucas was present but his counsel, Mr. Hoffman, was not (R. 5) In his absence, the judge made preliminary remarks to the jury (R. 5-13). The panel was sworn (R. 12) The court entered into the record a letter from Mr. Hoffman which recited that he was on trial in the Eastern District, before Judge Mishler, in a trial which had begun August 4, and was expected to conclude during the week of September 22 (R. 16a) Judge Cooper had, on September 16, informed Mr. Hoffman's office that the trial could not be delayed, and suggested someone else represent the defendant. No one was available, however (R. 18) Conversations occurred between Judge Cooper and Judge Mishler, who informed Judge Cooper that Mr. Hoffman could not be released (R. 20).

On September 22, the prosecutor urged Judge Cooper to issue a bench warrant for Hoffman's arrest (R. 24). Judge Cooper then called Mr. Hoffman, and had his end of the conversation transcribed (R. 24).[41] Judge Cooper directed Hoffman to appear the morning of September 24th (R. 26). The jury was excused (R. 32).

In Hoffman's absence, the court ruled on requests for additional peremptory challenges (R. 39) a motion for disclosure of witnesses (R. 44), a motion for disclosure of eavesdropping (R. 45) a motion for a hearing on Verzino's competency (R. 48), and various others. Defendant Lucas' counsel was not aware that these motions

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[41] Mr. Hoffman subsequently put his own explanation on the record (R. 891).

were to be heard in his absence. Selection of the jury, with Hoffman present, began on September 24th.

> "It is central to that principle [of the right to counsel] that . . . the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial" *United States* v. *Wade*, 388 U.S. 718, 726 (1967).

This is not a case where the absence of counsel could not "possibly" have had an effect, such as *United States* v. *Calabro*, 467 F.2d 973 (2d Cir. 1972), where the court received a repetitious note from the jury during the deliberations and repeated an instruction already given when counsel had been present. Moreover, the jury's question and the supplemental charge "had nothing whatever to do with the case against" the defendant whose counsel was absent. *Id.* at 988. Compare *United States* v. *Smith*, 411 F.2d 733 (6th Cir. 1969) where a reversal was required because the verdict was returned in the absence of defense counsel. Accord, *Thomas* v. *Hunter*, 153 F.2d 834 (10th Cir. 1946).

Defendant cannot prove, of course, that any of the motions decided without the knowledge or presence of counsel would have been decided otherwise had his counsel been there to argue those matters. Such would be an impossibility. That is why proof of prejudice is not required:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser* v. *United States*, 315 U.S. 60 (1942).

When the right to representation by counsel is abridged, no objection is even necessary. The remedy is reversal

and it does not rest on a showing of prejudice." *White* v. *Maryland*, 373 U.S. 59, 60 (n.) (1963).

Even if the harmless error doctrine were applicable to Sixth Amendment rights, the Government would have to prove beyond reasonable doubt that there was no possible impairment. *Chapman* v. *California*, 386 U.S. 18 (1967). This it manifestly cannot do. *Cf. United States* v. *Leighton*, 386 F.2d 822 (2d Cir. 1967).[42]

POINT VII

The written judgment and commitment in effect increased the sentence orally imposed by the court and should therefore be modified.

On January 27, 1976, the Court sentenced the defendant in open court as follows:

> "On Count 1, the defendant is sentenced to 20 years plus a $50,000 fine. On Count 5, 20 years and a $50,000 fine. Those two sentences on Counts 1 and 5 are to run concurrently.
>
> Count 6, we impose a sentence of 20 years and a $50,000 fine. Count 7, we impose a sentence of 20 years and a $50,000 fine. The jail commitments on Counts 6 and 7 are concurrent. However, the sentences imposed, the jail sentences imposed in Counts 6 and 7 are to run consecutively and not concurrently with the sentences imposed in Counts 1 and 5.

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[42] The question of harmless error is now before the Supreme Court in a case, like *Leighton, supra*, where the judge forbad the defendant to discuss the case with his counsel between direct and cross. *Geders* v. *United States*, DKT No. 74-5968, argued December 1, 1975. 44 LW 3343 (12/9/75). Opinion below, *Fink* v. *United States*, 502 F.2d 1 (5th Cir. 1974).

> The sentences, however, are not in any way to be diminished so that it is the intention of the court to impose a sentence of jail totaling 40 years and a fine of $200,000."
>
> * * * * *
>
> . . . in addition to the sentence imposed, the law commands that I add six years special parole. That is mandatory and must be added on to the sentence already announced" (A. 565-566).

In the written judgment and commitment filed the same day, the defendant's sentence was enhanced by the following:

> "This sentence to be in addition to, and exclusive of, any sentence now being served or to be imposed in the future" (A. 637).

A sentence to be served "exclusive of any sentence . . . to be imposed in the future" is alien to the law. Such a sentence would not only punish the defendant in advance of his committing a future crime, it would improperly arrogate jurisdiction from any future sentencing judge. It is plainly unlawful.

Apart from that, moreover.

> "It is the oral sentence which constitute the judgment of the court . . . If . . . [defendant] were sentenced not when he appeared before [the court] but at some later time when the commitment was signed, the sentence would be invalid since [defendant] was not present . . ." *Sobell* v. *United States*, [illegible] F.2d 180, 184 (2d Cir. 1969).

Accordingly, where, as here, there is a conflict between the oral sentence and the written judgment, the former is the only lawful sentence and the case must be remanded "with directions to correct the written judgment and commitment, and docket entries in accordance with the

oral pronouncements of sentence." *United States* v. *Marquez*, 506 F.2d 620 (2d Cir. 1974). See also, *Bartone* v. *United States*, 375 U.S. 52 (1963).

POINT VIII

The appellant Frank Lucas pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, respectfully adopts all points advanced by his co-appellants insofar as those points are applicable to him.

CONCLUSION

It is respectfully submitted that the judgment appealed from should be reversed and this case be remanded for a new trial or in the alternative that the case be remanded for a hearing on the issue of suppression of evidence favorable to the defense; and that in any event, this case be remanded to correct the written judgment and commitment heretofore entered against the defendant Lucas. If any further proceedings are ordered, it is respectfully submitted that they should be before a different judge.

Respectfully submitted,

JEFFREY C. HOFFMAN,
Attorney for Appellant Frank Lucas.

STEVEN DUKE,
JOHN L. POLLOK,
Of Counsel.

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